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December 3, 2002

Via Hand Delivery

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


**Re: Application Of
EchoStar Communications Corporation,
General Motors Corporation, And Hughes
Electronics Corporation For Consent For
A Proposed Transfer Of Control;
CS Docket No. 01-348**


Dear Ms. Dortch:

On behalf of our client, the National Rural Telecommunications Cooperative, please incorporate the attached Opposition into the record of the above referenced proceeding.¹ In accordance with 47 C.F.R. § 1.51(a)(1) of the Commission's Rules, an original and six copies are submitted. The attached correspondence has been served on all parties to the proceedings in accordance with 37 C.F.R. § 1.211 of the Commission's Rules.

Also enclosed is an additional copy of the correspondence which we ask you to date stamp and return with our messenger. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,


Jack Richards

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12/3/02

cc: The Honorable Richard Sippel, Presiding Officer

¹ Hearing Designation Order, *Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee. For Authority to Transfer Control, File Number 01-348, FCC 02-284* (released October 18, 2002).

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**EchoStar Communications Corporation,)
General Motors Corporation, 4nd Hughes)
Electronics Corporation)
For Consent For 4 Proposed Transfer)
Of Control)**

CS Docket No. 01-348

OPPOSITION OF THE
NATION 4L RURAL TELECOMMUNICATIONS COOPERATIVE

The *Hearing Certification* was submitted in response to the Commission's Hearing Designation Order (HDO).² In the HDO, the Commission tentatively concluded that the proposed transfer of control (the Application) of the Applicants' satellite, earth station and other related authorizations to New EchoStar (the Merger)' was not in the public interest. The

Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor, and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348 (filed December 3, 2001). On February 4, 2002, NRTC filed a Petition to Deny the Application. See Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002). See also Ex Parte Reply of the National Rural Telecommunications

Application was designated *for* administrative hearing (Hearing) in light of the many factual issues presented.

Since submitting the *Hewing Certification*, the Applicants filed an amendment to their Application, a Motion to Delete and Clarify Issues, and a Petition for Suspension of Hearing.⁵ The Applicants seek action on their *Hearing Certification* "only if the Commission decides not to suspend the hearing or, having suspended it, restarts the hearing process."⁶ In a sense, the Applicants seek to have the best of both worlds: they ask the Presiding Officer to certify that a hearing is not necessary on the original Application, yet at the same time they amend the original Application in a futile attempt to cure obvious defects and avoid a hearing on the amended Application as well.

To the extent the Commission decides not to suspend the hearing or, having suspended it, restarts the hearing process, NRTC urges the Presiding Officer to promptly deny the *Hearing Certification*.⁶ It is devoid of any factual support and contradicted by the Commission's express findings in the HDO.

Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed April 4, 2002) (*NRTCReply*); Petition to Deny of the National Association of Broadcasters, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002) (*NAB Petition*); Petition to Deny of Pegasus Communications Corporation, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002) (*Pegasus Petition*)

⁵ Petition For Suspension of Hearing, General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348 (filed November 21, 2002); Amendment to Consolidated Application For Authority to Transfer Control, General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348 (filed November 27, 2002); and Motion to Delete and Clarify Issues, General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348 (filed November 27, 2002). NRTC will respond to these filings in due course

⁶ *Hearing Certification*, p. 2.

⁶ Pleadings challenging the validity of a Hearing Designation Order are generally unauthorized and typically dismissed as such. See Order, *In re Family Broadcasting, Inc.*, 16 FCC Rcd. 12,801, n. 3 (2001); and Memorandum Opinion and Order, *In re Applications of WWOR-TV, Inc.*, 6 FCC Rcd. 4878, ¶3 (1991).

In the HDO, the Commission exhaustively reviewed the voluminous record in this proceeding and found that many of the Applicants' promised benefits -- local-into-local, nationwide pricing, broadband deployment -- were inadequately supported by the Applicants' data; were not merger-specific; were achievable through means other than creation of a monopoly; or were otherwise not recognized under the Commission's public interest standard.⁷ The Commission found that serious questions remained as to whether the proposed merger of the nation's only two Direct Broadcast Satellite (DBS) licensees "would do significant and irreversible damage to competition in several markets without sufficient offsetting and cognizable public interest benefits."⁸

I. OPPOSITION

A. The Applicants' Reliance On The AT&T/Comcast Proceeding Is Inappropriate.

1. As a basis for arguing that the Hearing is not necessary, the Applicants claim that the Commission's rejection of their Merger is "inconsistent with the Commission's wholehearted acceptance of much weaker claims in the case of AT&T/Comcast."⁹ In making this claim, however, the Applicants' completely disregard what the head of the Commission's Merger Review Team correctly characterized as the "vastly different" nature of these two distinct transactions.¹⁰

⁷ See, e.g., HDO, ¶¶208, 229-235, 284.

⁸ HDO, ¶287.

⁹ *Hearing Certification*, p. 3.

¹⁰ See Press Conference of W. Kenneth Ferree regarding AT&T and Comcast Merger Decision (dated November 14, 2002) (available at <http://www.fcc.gov/mb/atcomcast/>).

2. As the Commission noted, there are virtually no franchise overlaps or cable system overbuilds between AT&T and Comcast.¹¹ Neither competes against the other in either the multichannel video programming distributor (MVPD) or residential high-speed Internet markets." As a result, following the AT&T/Comcast merger, consumers will continue to be able to choose between a cable company, DIRECTV and EchoStar.¹³

3. On the other hand, EchoStar's and DIRECTV's service territories completely overlap. They compete not only nationwide but in virtually every local market in the country. As the Commission found, the Applicants' proposed Merger would have reduced the number of competitors from three to two or from two to one, depending on whether the consumer had access to cable service.

4. So while the merger of AT&T and Comcast merely changes control of the only cable platform in an area, the Merger of EchoStar and Hughes would completely *eliminate* one of two thriving competitors." This glaring distinction between the two mergers is unaddressed by the Applicants in their *Hearing Certification*.

5. Furthermore, the Commission's decision in the *AT&T Order* was contingent upon one easily verifiable and enforceable condition -- AT&T's divestiture of its interest in Time Warner

¹¹ Memorandum Opinion and Order. *In the matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. Transferors, to AT&T Comcast Corporation, Transferee*, FCC 02-310, ¶93, n. 248 (released November 14, 2002) (*AT&T Order*). Although AT&T disclosed some overbuilds with respect to its non-consolidated systems, in only four instances -- reflecting approximately 700 homes passed -- did the system directly compete with Comcast.

¹² *Id.*, ¶149. The Commission also determined that AT&T and Comcast did not compete with each other in the provision of Interactive Television Services. *Id.*, ¶163.

¹³ *Id.*, ¶91.

¹⁴ Such a drastic reduction in the number of competitors and concomitant increase in concentration created a "strong presumption of significant anticompetitive effects." *HDO*, 799. The Department of Justice (DOJ) and twenty three states reached an identical conclusion, stating that the anti-trust case was filed "to prevent a merger that would leave millions of consumers facing a monopoly and tens of millions of consumers facing a duopoly. The merger would eliminate the vigorous competition between EchoStar and DirecTV that has brought consumers lower prices and better products." *DOJ Brief*, p. 2

Entertainment. To the contrary, the Applicants' proposed Merger was contingent on a number of unacceptable, unenforceable and vague promises, including a promise to establish national pricing for video services, a promise to offer national pricing for "basic" broadband services, and a promise to provide local-into-local service in all 210 DMAs. Yet the Applicants never provided any degree of detail as to how, when or even whether these promises could be implemented or enforced. The sheer magnitude and difficulty of relying on such promises was not lost on the Commission, which concluded that it would be "costly and difficult for the Commission to perform such monitoring and enforcement, and it is unclear how effective its enforcement efforts would, or could, be."

6. In light of the Applicants' multiple promises of future behavior, the Commission expressed deep concern regarding EchoStar's past conduct with the Commission. Because EchoStar often exhibited "resistance to taking steps to serve the public interest that do not also serve the company's view of its own private economic interest," the Commission concluded that "past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives."¹⁵ This factor, too, was understandably troubling to the Commission and absent from the AT&T/Comcast merger.

B. The HDO Fully Promotes The Interests of Rural Consumers.

7. Despite the Applicants' incredible claims to the contrary, in designating the Application for hearing the Commission did not misapply its policy of promoting the interests of

¹⁵ HDO, ¶183.

¹⁶ HDO, ¶35.

rural consumers.¹⁷ The Commission's decision to reject the Merger was based in large part on well documented concerns regarding the adverse impact on rural consumers.

8. NRTC and others graphically and convincingly demonstrated that the proposed Merger would have staggering consequences for consumers in rural areas. NRTC's own expert economist, Dr. Paul MacAvoy, demonstrated that consumer welfare losses stemming from the Merger would be as much as \$700 million each year based solely on EchoStar's and DIRECTV's current DBS subscribers. Not coincidentally, other expert economists reached similar conclusions regarding the substantial harm to consumers that would be caused by the Merger.¹⁸

9. Far from depriving rural consumers of the Applicants' promised benefits, the Commission's rejection of the proposed Merger ensures that rural consumers will continue to reap the benefits of competitive MVPD and broadband markets -- rather than suffer the consequences of a monopoly provider.”

C. A Hearing Is Necessary To Resolve A Number Of Factual Issues That Remain In Dispute.

10. Throughout this proceeding, the Applicants failed to provide meaningful or substantive details regarding their promises of national pricing, local-into-local and “basic” broadband service. Although they had ample opportunity, the Applicants never fully described, for example, how national pricing would be established or enforced; when all local channels

¹⁷ *Hearing Certification*, p. 21

¹⁸ See Declaration of J. Gregory Sidak, pp. 28-30 (included as Appendix B to the *NAB Petition*) (concluding that the loss of consumer welfare as a result of the Merger would be more than \$3 billion over five years); Affidavit of Daniel L. Rubinfeld, pp. 14-15, n. 59 (included as Attachment A to the *Pegasus Petition*) (predicting consumer losses in the neighborhood of \$600 million for new subscribers alone).

¹⁹ See, e.g., *HDO*, Separate Statement of Commissioner Michael J. Copps, who concluded that “the future of rural America must not be subject to a roll of the dice from the Commission because a few believe that somehow such an unprecedented combination of commercial power will be dedicated to rural development. That is playing fast and loose with too many Americans whose future is challenging enough without our foisting upon them a monopoly that could further erode their well-being and independence.”

would be made available in all 210 DMAs; and what constituted “basic” broadband service While the list goes on, the questions remain unanswered.”

11. Following more than one year of debate at the Commission, the Applicants assert that virtually all of the key facts regarding the proposed Merger are now somehow “undisputed” and “militate for grant of the merger application without a hearing.”²⁰ As the Commission recognized in its HDO, however, many factual issues remain in sharp dispute, including, for instance, the scope and nature of the product and geographic markets; the effect of the Merger on price, quality and innovation; the timeliness and likelihood of entry by potential competitors; and the critical issue of the number of homes across the country that are not passed by cable and will have no choice in provider if the Merger is approved. The Applicants simply gloss over these questions by asserting that their views on a number of issues -- broadband, local-into-local, competitive effects -- have either been overlooked or misinterpreted by the Commission

12. It is clear from the extensive record in this proceeding that none of the Applicants’ claims has been “overlooked” by the Commission. Nor has the Commission “misapplied” its policies. If anything, the Commission has generously allowed the Applicants to pursue the factual issues further at a Hearing rather than ruling summarily against the Applicants based on extensive document review and technical analysis that are part of the record. Since the Commission has taken the position that it cannot reject the proposed Merger outright at this point, a full evidentiary Hearing is the only option available if the Applicants insist on prosecuting their Application

²⁰ The Commission noted that despite its efforts to “obtain additional information and data from the Applicants in support of their claims, serious questions remain as to whether the proposed transaction would do significant and irreversible damage to competition in several markets without sufficient offsetting and cognizable public interest benefits.” HDO, ¶287.

²¹ *Hearing Certification*, p. 1.

D. The Applicants' Self-Imposed Deadline Does Not Justify Expedited Action By The Commission.

13. The DOJ and 23 State Attorneys General already have pointed out that the Applicants' recent efforts to press their proposed Merger appear to have nothing to do with the Merger itself and everything to do with the \$600 million break-up fee." The *Hewing Certification* is only the latest in what DOJ characterized as an elaborate "kabuki dance"" designed to gain a better defensive posture in subsequent litigation surrounding the \$600 million fee.

14. The Applicants' request for expedited action is based entirely on their own self-imposed contract deadline.²⁴ As DOJ and the States noted, however, the Applicants' "self-created deadline can be changed with the stroke of a pen."" Their unwillingness to change the deadline as a business matter provides no legitimate basis for the expedited and extraordinary relief they seek in the *Hearing Certification*.

15. The Applicants' new-found sense of urgency reflects yet another change in their position regarding the speed and timing of this proceeding. At the outset, the Applicants requested expedited treatment of their Application.²⁶ But on the due date for their production of documents to the Commission, the Applicants failed to produce the required materials and

²² Memorandum In Support Of Plaintiffs' Motion For Scheduling Order, *United States of America, et al. v. EchoStar Communications Corporation, et al.*, Civil No. 1:02CV02138, p. 4 (D. D.C., filed October 31, 2002) (*DOJ Brief*).

²³ *Id.*

²⁴ *Hearing Certification*, pp. 2-3.

²⁵ *DOJ Brief*, p. 3. The Applicants recently agreed to the extension of other deadlines contained in the same contract. See Letter from Pantelis Michalopoulos, Counsel to EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to Marlene Dortch, Secretary, Federal Communications Commission, dated October 15, 2002.

²⁶ *Application*, p. 2.

instead requested an extension of the discovery period.” The Commission admonished the Applicants for their failure to meet the deadline and stopped the Merger Review Clock for 138 days while the Applicants continued to procrastinate.²⁸

16. The 110.1 and the States also took note of “the slow pace at which [requested information] was produced” by the Applicants.” They catalogued a litany of “desultory” behavior by the Applicants. For example, the Applicants received a standard statutory “second request” for information and documents on December 17, 2001. The average recipient of such a second request in 2001 - 2002 took 54 days to comply. The Applicants, however, took 308 days to comply -- wailing until one week after the Commission’s denial of the Merger (October 25, 2002). In fact, after 54 days had passed, the Applicants had produced only 10 of an eventual 1,600 boxes of documents. During this same 54 day period, EchoStar produced none.”

17. Only eight weeks ago, the Applicants again attempted to slow the Commission’s decision. They urged the Commission to “await completion of DOJ’s fact-gathering and negotiations with the parties, and similar discussions between the parties and the Commission prior to acting in this proceeding.””

18. Now -- suddenly -- the Applicants change course again and urge the Commission to expedite its review of the *Hewing Certification* solely to protect themselves from their own self-

²⁷ See Letter from Pantelis Michalopoulos, Counsel to EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to Mr. William F. Caton, Secretary, Federal Communications Commission, dated March 5, 2002.

²⁸ See Letter from W. Kenneth Ferree, Chief, Cable Services Bureau to Pantelis Michalopoulos, Counsel to EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, dated March 7, 2002.

²⁹ *DOJ Brief*, n. 12

³⁰ *Id.*, p. 7

³¹ See Letter from Pantelis Michalopoulos, Counsel to EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to Chairman Michael K. Powell, Federal Communications Commission, and W. Kenneth Ferree, Chief, Media Bureau, dated October 7, 2002.

imposed contract deadline." For this reason alone, their self-serving request should be dismissed outright.

II. CONCLUSION.

The Applicants' request for expedited handling of their *Hearing Certification* is nothing more than a posturing tactic related solely to their contract. It does not justify any type of "expedited action" by the Presiding Officer or the Commission. An evidentiary Hearing remains necessary to resolve the many factual issues in dispute in the event the Hearing is not suspended. The *Hearing Certification* should be denied

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December 3, 2002

¹ The Applicants' repeated "Flip-Flops" on issues of material importance in this proceeding have been well documented. See *NRTC Reply*, pp. 3-10.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 2002, a true and correct copy of the foregoing Opposition of the National Rural Telecommunications Cooperative in the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (CS Docket No. 01-348), was submitted to the Federal Communications Commission via hand delivery and facsimile and served via courier and First Class Mail upon the following:

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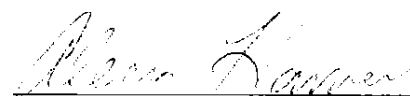
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